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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT GONZALEZ,

Plaintiff and Appellant,

v.

ALL AMERICAN ASPHALT et al.,

Defendants and Respondents.

B214657

(Los Angeles County
Super. Ct. No. BC389814)

APPEAL from an order of the Superior Court of Los Angeles County.

Ann I. Jones, Judge. Vacated.

Arbogast & Berns, David M. Arbogast and Jeffrey K. Berns for Plaintiff and Appellant.

Rutan & Tucker, Mark J. Payne and Shawn M. Larsen for Defendants and Respondents.

Counsel appeals from an order imposing sanctions against him for misuse of the discovery process. We vacate the sanction order.

BACKGROUND

On July 31, 2008, Robert Gonzalez filed a first amended complaint against All American Asphalt (AAA) on his own behalf and as a representative of a class of asphalt truck drivers alleging claims for violations of laws governing wages and hours worked on public works projects.¹

On October 16, 2008, Gonzalez filed a “motion to compel [AAA] to provide further responses to plaintiff’s first set of requests for admissions; first set of form interrogatories; first demand for inspection of documents; and first set of special interrogatories,” and requested sanctions be imposed against AAA. (Capitalization and Bold omitted.) AAA filed opposition, objecting that Gonzalez’s requests for discovery were vague and ambiguous or were directed at the wrong party. AAA requested that sanctions be imposed against Gonzalez.

On Friday, November 21, 2008, the court held a hearing on Gonzalez’s motion to compel. At the conclusion of the hearing, the court stated that it would take the matter under submission, rereview the motion and opposition, and issue its ruling “probably before Thanksgiving” which fell on Thursday, November 27.

Immediately after the Friday November 21, 2008 hearing counsel for AAA and counsel for Gonzalez met in the hallway outside the courtroom and agreed to attempt to reach an agreement before the court ruled on the motion. That afternoon AAA sent Gonzalez an e-mail discussing the disputed issues and suggesting possible resolutions for each. In this e-mail AAA wrote: “As we discussed, [AAA] is willing to amend/clarify most of its responses prior to a ruling from the Court. In exchange for a withdrawal of the Motion [to compel] (and accompanying sanctions requests) as to them, [AAA] will

¹ On August 5, 2008, Gonzalez amended his first amended complaint to add his employer, Betts Express, as a defendant. Betts Express is not a party to this appeal.

provide supplemental responses to” certain requests. At the end of its e-mail message AAA stated “[i]f we are going to work out any agreements . . . regarding the [AAA] discovery now in front of the Court, we need to do so ASAP, so we get a stipulation put together before she issues a ruling.”

On Monday morning, November 24, 2008, at 11:40 a.m. Gonzalez’s counsel responded to AAA’s e-mail and commented on AAA’s proposals to resolve the discovery dispute. Counsel explained that he was then at home with a cold, but offered to call if AAA was interested in resolving any of the discovery issues by stipulation and proposed order.

At 3:31 p.m., Gonzalez e-mailed AAA a proposed stipulation regarding the discovery matters on which the parties agreed. At 3:36 p.m., AAA sent a responsive e-mail objecting to the signature block but generally agreeing to the stipulation’s content. In this message AAA wrote, “you should call the Court to let them know it’s coming.” At 3:39 p.m., Gonzalez e-mailed AAA a corrected copy of the stipulation which counsel for AAA signed and returned to Gonzalez at 3:45 p.m.

The stipulation is silent with respect to any preconditions for its validity. The stipulation does not specify that it would only be effective if filed with the court before the court ruled on Gonzalez’s motion to compel, does not specify that it would only be effective if the parties reached agreement before the court ruled on the motion, and does not state any other condition for its validity. In his declaration, Gonzalez’s counsel stated that he came into the office late in the afternoon on November 24, 2008, and put the stipulation in his secretary’s out box for filing.

Sometime on the same day, November 24, 2008, the court issued its ruling denying Gonzalez’s motion to compel and declining to award either party sanctions, finding that both sides’ positions were substantially justified.

Gonzalez’s counsel stated in a declaration that the next day, Tuesday, November 25, 2008, at approximately 4:00 p.m. when he retrieved his mail he received a

copy of the court's ruling denying the motion to compel. At 4:01 p.m., Gonzalez e-mailed AAA a copy of the court's ruling.

At 3:58 p.m., AAA had sent Gonzalez an e-mail asking "[d]id you file this today? Were you able to call the Court to let them know it was coming? Thanks." At 4:11 p.m., Gonzalez answered this e-mail and told AAA "No. When I finally got through to the Court yesterday, it said that it had already mailed the ruling. . . ." At 4:12 p.m., AAA responded that "[i]t looks like she disregarded our further 'meet and confer' agreement. In light of the Court's ruling, we will not be providing supplemental responses to the Form Rogs and RFA's after all. . . ." At 4:13 p.m., Gonzalez sent AAA an e-mail response stating "[a]ctually, she never got it to disregard. . . ."

On the following day, Wednesday, November 26, 2008, the stipulation was filed with the court. On December 1, 2008, the court signed the order attached to the stipulation directing AAA to provide the discovery specified in the stipulation.

On December 5, 2008, AAA wrote Gonzalez a letter stating that AAA would not be providing further responses because the court's ruling denying Gonzalez's motion to compel rendered the stipulation moot. AAA accused Gonzalez of deliberately waiting until the court issued its ruling before filing the stipulation, and stated that if Gonzalez did not agree to set aside the court's order based on the moot stipulation, AAA would move to vacate the court's order and request sanctions.

On December 8, 2008, Gonzalez replied to AAA by letter and stated that after AAA signed the stipulation it was "immediately sent to the Court via our attorney service." Gonzalez further asserted that "[c]ontrary to what you assert, the Stipulation that you agreed to on November 21 and signed on November 24th was sent to the Court *before* I received and sent you the Notice of Ruling on Plaintiff's motion to compel."

On December 23, 2008, AAA moved to set aside the court's discovery order claiming that Gonzalez had obtained it through fraud and misrepresentation. AAA argued that it had entered into the stipulation on the understanding that it would be filed with the court prior to a ruling on Gonzalez's motion to compel and argued that Gonzalez

had breached the parties' agreement by waiting until after the court ruled to file the stipulation. AAA asserted that Gonzalez did so hoping that the court would grant both his motion to compel and request for sanctions, knowing he could still get the discovery he wanted by filing the stipulation in the event the court denied his motion to compel. AAA asserted that filing the stipulation after the court ruled on the motion constituted fraud on the court because the stipulation was subject to the "express condition" that it be filed before the court issued a ruling. AAA requested sanctions under Code of Civil Procedure section 2023.030, subdivision (a) against Gonzalez's counsel for misuse of the discovery process by (1) filing the moot stipulation and (2) misrepresenting facts regarding when he submitted the stipulation for filing with the court.

Gonzalez opposed AAA's motion and request for sanctions, arguing that the stipulation was valid and AAA was improperly attempting to withdraw from the stipulation it had entered into and signed.

On February 5, 2009, the court held a hearing on AAA's motion to set aside the discovery order entered on the stipulation. The following exchange between the court and Gonzalez's counsel took place:

"THE COURT: Did you know it was a conditional stipulation?

"[Counsel]: Conditioned on what?

"THE COURT: Did you understand that the stipulation was conditioned on reaching the agreement before the court had ruled?

"[Counsel]: Yes, we did.

"THE COURT: And once you were aware of the court's order, that the court had ruled, did you submit the stipulation to this department?

"[Counsel]: No. It was submitted to this court before.

"THE COURT: The date stamp [of November 26, 2008], sir, belies that.

"[Counsel]: But that's through the transmission. That is through our court service.

“THE COURT: Did you call my department to withdraw the stipulation, sir, and inform the court that the stipulation was of no form and effect because the court had ruled?

“[Counsel]: No

“THE COURT: That’s right, you didn’t. And frankly, sir, it’s the sharpest of sharp practice. I can absolutely not condone it. To submit a document to my department that you know is not a stipulation because the stipulation was subject to an express condition that you know has not been satisfied, is the sharpest of sharp practice. . . .”

In its minute order the court stated: “The court finds that plaintiff attempted to mislead the court by filing the withdrawn stipulation after the court issued its order on plaintiff’s motion to compel. Plaintiff’s claim that he was physically ill during the relevant period is not a sufficient justification for allowing the court to consider a stipulation that was no longer in effect. A simple telephone call to withdraw the stipulation would have been sufficient. [¶] Further, thereafter, plaintiff sought to enforce a stipulation obtained by artifice by demanding that defendants provide discovery pursuant to its terms.”

The court granted AAA’s request to set aside the discovery order and imposed sanctions of \$7,000 against Gonzalez’s counsel. Counsel filed a notice of appeal from the sanction order.²

DISCUSSION

AAA contends that the stipulation was conditioned on it being *filed* before the court issued its order. Gonzalez, however, disputes that contention and argues that the parties’ only agreement was that they must *reach* a stipulation before the court ruled. We

² An award of a monetary sanction of more than \$5,000 is directly appealable. (Code Civ. Proc., § 904.1, subd. (a)(12); *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1285, fn. 7.) Because the sanction order is the only matter before us, we do not address the merits of the underlying discovery orders or the validity of the stipulation. (See, e.g., *Southern Pac. Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786 [“orders relating to inspection and discovery are not appealable”]; *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 984 [an order denying a motion to compel is not an appealable order].)

note AAA does not claim that Gonzalez’s counsel knew the court had ruled before they signed the stipulation. Nor does AAA claim that Gonzalez’s counsel knew that the court had denied his motion to compel before he gave the signed stipulation to the attorney service for filing. AAA’s claim is that the stipulation was conditioned on it actually being filed before the court issued a ruling and that allowing it to be filed, knowing of the court’s order, was a fraud on the court and a misuse of the discovery process.

Standard of Review of a Discovery Sanction

Generally, a court’s award of discovery sanctions is reviewed for abuse of discretion “subject to reversal only for manifest abuse exceeding the bounds of reason. [Citation.]” (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) To the extent that the court’s award of discovery sanctions was based on factual findings, “that ruling is subject to the substantial evidence standard of review. [Citations.]” (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.)

Misuse of the Discovery Process

Gonzalez’s counsel contends the trial court abused its discretion by imposing sanctions against him. We agree.

Code of Civil Procedure section 2023.030 provides for sanctions for misuse of the discovery process.³ Here the sanctionable “misuse of the discovery process,” or

³ Code of Civil Procedure section 2023.030 provides in part: “To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

“(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney’s fees incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”

Code of Civil Procedure section 2023.010 describes certain conduct as “[m]isuses of the discovery process.” The list does not purport to be exclusive and does not specify that filing a stipulation concerning discovery which one party considers withdrawn or ineffective as a “misuse.” We need not

improper “artifice,” was based on the court’s finding that counsel filed the stipulation knowing it was “subject to an express condition” that had not been satisfied. In so finding, the court adopted AAA’s argument that the “express agreement” required the stipulation to be *filed* with the court *before* the court ruled on Gonzalez’s motion to compel. The record, however, contains no substantial evidence that the parties had reached such an agreement.

Not the stipulation itself, the discussion of the parties, nor the series of the parties’ e-mails, required the stipulation to be *filed* before the court issued its order. The stipulation itself is unconditional. In their discussions, even as described by AAA’s counsel’s declaration, AAA’s counsel never conditioned his agreement on the stipulation being filed before the court ruled, but only stated that he wanted to “resolv[e] the issue *prior to* a Court ruling.”⁴ In other words, he voiced a desire that a stipulation be *reached* before the court ruled. Similarly, AAA’s various e-mails only stated that they should get their “stipulation put together before [the court] issue[d] a ruling.” AAA’s recommendation that Gonzalez’s counsel telephone the court to inform it that they were working on a stipulation to resolve their discovery disputes does not change the terms of their agreement. The most that can be gleaned from their conversations and correspondence is that counsel agreed that the stipulation had to be completed before the court issued its ruling. This in fact occurred. Thus, because the condition had been met, Gonzalez’s counsel did not violate the parties’ agreement by causing it to be filed.

Further, and contrary to AAA’s argument, Gonzalez’s counsel did not admit at the hearing that the stipulation was conditioned on it being *filed* with the court before the

consider whether this section was properly invoked as authority for imposing the sanctions in light of our conclusion that the justification for imposing sanctions lacked evidentiary support.

⁴ In his declaration, AAA’s counsel stated that in an e-mail sent December 4, 2008, at 5:03 p.m., he reminded Gonzalez’s counsel that AAA had agreed to the stipulation “on the express agreement that he would *file* it *before* the Court’s ruling.” (First italics added, second italics and underscoring in original.) AAA’s counsel’s e-mail actually said that AAA entered into the stipulation as a “good faith gesture” “in hopes [of] resolving the issue *prior to* a Court ruling” and did not say that the stipulation was conditioned on it being *filed* before the court ruled.

court ruled on the motion to compel. Rather, the record shows only that counsel agreed with the court that he understood “that the stipulation was conditioned *on reaching the agreement* before the court had ruled.” (Italics added.)

Here it appears that AAA persuaded the court that the parties had expressly agreed that the validity of their stipulation was conditioned on *filing* it before the court had an opportunity to rule on the motion to compel, and further convinced the court that counsel had knowingly violated this condition by filing the stipulation after the court had ruled and that this conduct amounted to improper gamesmanship and trickery and should be sanctioned as a misuse of the discovery process. AAA however, produced no evidence, by declaration or otherwise, to support this argument. (See, e.g., *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261 [where there was no evidentiary basis for finding that counsel had advised disobedience to the discovery order, sanctions against counsel were not warranted].)

Because the factual basis underlying the court’s rational for imposing sanctions finds no support in the record, we conclude the sanction award must be vacated as an abuse of discretion. (*Kuhns v. State of California, supra*, 8 Cal.App.4th at p. 988.)⁵

⁵ Because we vacate the portion of the order imposing sanctions, we decline AAA’s request for an award of attorneys’ fees on appeal.

DISPOSITION

The order, insofar as it imposed sanctions against Gonzalez's counsel, is vacated.
Each side to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.